FILED
MAY 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1591

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

REBECCA P. SCHWANECKE, M.D., F.A.A.P., ET AL
Petitioners,

V.

VASEEM ALI, M.D., ET AL,
Respondents.

RESPONDENTS' JOINT OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

*JIM MATTOX
Attorney General of Texas
MARY F. KELLER
Executive Assistant
J. PATRICK WISEMAN
Chief, State & County Affairs
JAMES C. TODD
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120

FULBRIGHT & JAWORSKI
Terry O. Tottenham
1301 McKinney Street
Houston, Texas, 77010
(713) 651-5151

ELKINS, POWELL & YOUNT
Michael T. Powell
4800 First City Tower
1100 Louisiana
Houston, Texas 77002
(713) 659-8770

VINSON & ELKINS
Craig Smyser
3122 First City Tower
Houston, Texas 77002
(713) 654-4536

**Attorneys for Respondents*

24 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioners lack standing to bring suit:

   A. As next friends of unborn fetuses which as a matter of Federal constitutional law may not constitute the real party-in-interest;

   B. As next friends of "abortion survivors" who already have lawful guardians;

   C. As citizen, resident and taxpayer claimants where such claimants fail to show, under Texas law, a personal stake in the case?

2. Whether the expenditure of State funds for abortions and related research is a matter of legislative choice?

3. Whether this Court should overrule *Roe v. Wade* even though the decision is constitutionally sound?

4. Whether the Texas Court of Appeals correctly applied the abuse of discretion standard in reviewing the award of attorneys' fees under 42 U.S.C § 1988?

LIST OF PARTIES

To prevent unnecessary duplication and to save time and expense for the convenience of all parties involved, including the Court, the Respondents hereby submit their Joint Brief In Opposition to the instant Petition For Writ Of Certiorari. The Respondents are made up of four (4) groups, and each group is represented by their respective counsel as designated below:

1. Vaseem Ali, M.D.; Jim Mattox, Attorney General of Texas; and The University of Texas ..... "Ali, et al"

   Represented by:
   JIM MATTOX
   Attorney General of Texas
   MARY F. KELLER
   Executive Assistant Attorney General
   J. PATRICK WISEMAN
   Chief, State & County Affairs
   *JAMES C. TODD
   Assistant Attorney General

2. Hermann Hospital Foundation, d/b/a Hermann hospital ..... "Hospital"

   Represented by:
   FULBRIGHT & JAWORSKI
   Terry O. Tottenham

3. John Brady Coleman, M.D.; Joe Wesley Ramsey, M.D.; Alan Daven Rosen, M.D.; Cullen Women's Center, Inc.; Nova Health Systems, Inc.; and Planned Parenthood of Houston and Southeast Texas, Inc. ..... "Coleman, et al"

   Represented by:
   VINSON & ELKINS
   Craig Smyser

*Attorney of Record in this proceeding.

4. Gary L. Binder, M.D. ..... "Binder"

Represented by:
ELKINS, POWELL & YOUNT
Michael T. Powell

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

STATUTORY PROVISIONS AND RULES INVOLVED 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 4

ARGUMENT 4

I. THE TEXAS COURT OF APPEALS PROPERLY HELD THAT PETITIONERS LACKED STANDING TO BRING SUIT 4

A. Petitioners Lack Representative Capacity As "Next Friends" 5

B. Petitioners Lack Personal And Representative Capacity As Citizen, Resident And Taxpayer Claimants 7

II. THE USE OF STATE RESOURCES ON ABORTIONS OR FOR ABORTION-RELATED ACTIVITY IS LAWFUL 8

III. *ROE V. WADE* AND *DOE V. BOLTON* ARE SOUND PRECEDENT 10

IV THE TEXAS COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW IN UPHOLDING THE AWARD OF ATTORNEYS' FEES 12

CONCLUSION 13

PROOF OF SERVICE 14

APPENDIX A-1

Respondents Ali, et al's Motion for Attorneys' Fees .. A-1

TABLE OF AUTHORITIES

CASES **Page**

Ass'n of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970) 7

Brady v. Doe, 598 S.W.2d 338 (Tex. Civ. App.—[14th Dist.] 1980, writ ref. n.r.e.) 6

Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412 (1978) 13

City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) 12

City of San Antonio v. Stumberg, 70 Tex. 366, 7 S.W. 754 (1888) 7

Equal Employment Opportunity Comm'n v. St. Louis San Francisco Railway Co., 743 F.2d 739 (10th Cir. 1984) 12

Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982) 9

Harris v. McRae, 448 U.S. 297 (1980) 8,9

Harris v. Plastics Manufacturing Co., 617 F.2d 438 (5th Cir. 1980) 12

Keith v. Daley, 764 F.2d 1265 (7th Cir. 1985) 6

Kordus v. The City of Garland, 561 S.W.2d 260 (Tex. Civ. App.,—Tyler 1978, writ ref. n.r.e.) 8

Maher v. Roe, 432 U.S. 467 (1977) 8,9

Marbury v. Madison, 5 U.S. (1 Cranch, 137) 267 (1803) 6

Poelker v. Doe, 432 U.S. 519 (1977) 9

Roe v. Wade, 410 U.S. 113 (1973) . . . . . *passim*

Scott v. Board of Adjustment, 405 S.W.2d 55 (Tex. 1966) 7

Showery v. State, 690 S.W.2d 689 (Tex. App.—El Paso 1985) 11

Torres v. County of Oakland, 758 F.2d 147 (6th Cir. 1985) . . . 12

Tri County Citizens Rights Organization v. Johnson, 498 S.W.2d 227 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.) . . 7

Warth v. Seldin, 422 U.S. 490 (1975) 7

Welch v. University of Texas and its Marine Science Institute, 659 F.2d 531 (5th Cir. 1981) 12

STATUTES

Federal:

42 U.S.C. §1988 (1981) 12

State:

TEX. FAM. CODE ANN. §12.05 (Vernon Pamph. 1986) . . 1,11

TEX. FAM. CODE ANN. §17.011 (Vernon Pamph. 1986) . . 2,6

TEX. R. CIV. P. 173 (Vernon 1976) 3,7

TEX. R. CIV. P. 44 (Vernon 1979) 2,5,6

TEX. R. CIV. P. 42 (a) (3) (Vernon Supp. 1986) 2,8

CONSTITUTION

U.S. CONST. Amend. X 9

NO. 85-1591

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

REBECCA P. SCHWANECKE, M.D., F.A.A.P., ET AL
Petitioners,

V.

VASEEM ALI, M.D., ET AL,
Respondents.

RESPONDENTS' JOINT OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COME NOW Respondents and file this Joint Brief in Opposition to the Petition for Writ of Certiorari, and in support thereof, would respectfully show the following:

STATUTORY PROVISIONS AND RULES INVOLVED

I. TEXAS STATUTES

Tex. Fam. Code Ann. §12.05 (Vernon Pamph. 1986)

(a) A living human child born alive after an abortion or premature birth is entitled to the same rights, powers, and privileges as are granted by the laws of this state to any other child born alive after the normal gestation period.

(b) In this code, "born alive" means the complete expulsion or extraction from its mother of a product of conception, irrespective of the duration of pregnancy, which, after such

separation, breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached; each product of such a birth is considered born alive.

Tex. Fam. Code Ann. §17.011 (Vernon Pamph. 1986)

An authorized representative of the Texas Department of Human Services may assume the care, control, and custody of a child born alive as the result of an abortion as defined in Subsection 15.022 of this code and, if so, shall file a petition under Section 17.02 of this code and comply with all the provisions of Section 11.09 of this code. A child the possession of whom is assumed under this section need not be delivered to the court except on the order of the court.

II. TEXAS RULES OF CIVIL PROCEDURE

Tex. R. Civ. P. 42(a)(3) (Vernon Supp. 1986)

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law, or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Tex. R. Civ. P. 44 (Vernon 1979)

Minors, lunatics, idiots, or persons non compos mentis who have no legal guardian may sue and be represented by "next friend" under the following rules:

(1) Such next friend shall have the same rights concerning such suits as guardians have, but shall give security for costs, or affidavits in lieu thereof, when required.

(2) Such next friend or his attorney of record may with the approval of the court compromise suits and agree to judgments,

and such judgments, agreements and compromises, when approved by the court, shall be forever binding and conclusive upon the party plaintiff in such suit.

Tex. R. Civ. P. 173 (Vernon 1976)

When a minor, lunatic, idiot or a non-compos mentis may be a defendant to a suit and has no guardian within this State, or where such person is a party to a suit either as plaintiff, defendant or intervenor and is represented by a next friend or a guardian who appears to the court to have an interest adverse to such minor, lunatic, idiot or non-compos mentis, the court shall appoint a guardian ad litem for such person and shall allow him a reasonable fee for his services to be taxed as a part of the costs.

STATEMENT OF THE CASE

Petitioners brought suit in state court seeking declaratory and injunctive relief against Respondents for complained of abortion and abortion related activities. All Petitioners claim standing as next friends of unborn and "recently born" children.[1] They also seek to prosecute their claims as representatives of classes of such unborn and recently born children. Additionally, certain Petitioners (Berkley and Gomez Intervenors) seek relief individually as citizen, resident and taxpayer claimants and as representatives of all other citizen taxpayers in a Texas-wide class.

Overall, Petitioners seek to enjoin the performance of abortions in Texas and to enjoin the expenditure of public funds which aid the practice of abortions. Petitioners also challenge the validity of *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973), and seek to have those decisions overruled.

Between October, 1979 and August, 1984, Respondents filed separate motions for summary judgment against Petitioners, which were granted by the trial court. Respondents Ali, et al

---

1. "Recently born" as used throughout this brief denotes those fetuses that have survived the abortion process (i.e., an unsuccessful abortion).

were also granted attorneys' fees. The Texas Court of Appeals in an unpublished opinion upheld the trial court's rulings on the grounds that Petitioners lacked standing to bring and maintain suit. Schwanecke, M.D., F.A.A.P., et al v. Ali, M.D. et al, No. 01-84-0664-CV (Tex. App. — Houston [1st Dist.] June 7, 1985) [Reprinted in Petitioners' Brief]. The case was then appealed to the Supreme Court of Texas in an application for Writ of Error. The Texas Supreme Court refused the writ, finding "no reversible error."

The case is now before this Court on a Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The Texas Court of Appeals correctly determined that Petitioners lacked standing to bring suit as next friends of unborn and recently born fetuses. The unborn have no legal status under the United States Constitution, and Texas law has not deviated from this stance. The court also correctly determined that under Texas law, Petitioners lack standing as citizen, resident and taxpayer claimants.

Because Petitioners' lack of standing was dispositive of the case, it was unnecessary for the Texas Court of Appeals to consider any of the other issues. However, even if the court had addressed the other issues, Respondents would nevertheless be entitled to judgment as a matter of law since Respondents have not engaged in any unlawful activity. Petitioners' suit is cognizable only if this Court's decision in *Roe v. Wade* is deemed invalid. In view of the legal issues presented in the instant case, this Court need not depart from the strong precedent established in *Roe* since no novel questions have been raised by Petitioners.

ARGUMENT

I. THE TEXAS COURT OF APPEALS PROPERLY HELD THAT PETITIONERS LACKED STANDING TO BRING SUIT.

Petitioners lack standing to bring this suit, and the Texas

Court of Appeals properly found this issue to be dispositive of the case. Petitioners contend that the Court of Appeals' ruling that Petitioners lacked standing to sue constituted a "naked deprivation of life, liberty, and/or property rights" and a "naked denial to them of the equal protection of the laws." They further contend that these "deprivations" and "denials" were made "simply because they appeared before the Court in a lawsuit challenging abortions." Petitioners' contentions, however, are erroneous and misplaced.

In this case Petitioners alleged a cause of action in both personal and representative capacities as follows:

(1) Rebecca P. Schwanecke, as "next friend" of a non-certified class of minor unborn and recently born children in Harris County, Texas;

(2) Ann Richardson, as "next friend" of the unborn child of Jane Roe and a non-certified class of minor unborn children in Harris County, Texas;

(3) Heather Berkley and Brenda Gomez, as "next friends" of a non-certified class of minor unborn and recently born children in Texas; and

(4) Heather Berkley and Brenda Gomez, individually and on behalf of a non-certified class of citizens, residents and taxpayers of Texas.

A. Petitioners Lack Representative Capacity as "Next Friends."

The Texas Court of Appeals properly ruled that Petitioners Schwanecke, Richardson, Berkley and Gomez lacked standing to sue as "next friends" of their proposed classes of minor unborn and recently born children. Petitioners have not alleged or shown any relationship or link to the classes they propose to represent. While Petitioners may be passionately concerned about their proposed classes, such concern is insufficient to establish their legal standing to sue.

Rule 44 of the Texas Rules of Civil Procedure provides that

"minors" may sue and be represented by a "next friend." TEX. R. CIV. P. 44 (Vernon 1979). An unborn fetus, however, is not a "minor" under the law. This Honorable Supreme Court ruled in *Roe v. Wade*, 410 U.S. 113 (1973), that the word "person" as used in the context of the fourteenth amendment did not include the unborn. *Roe*, 410 U.S. 158. Since the United States Supreme Court's holdings are the law of the land [*Marbury v. Madison*, 5 U.S. (1 Cranch, 137) 267 (1803)], the Supreme Court's holding in *Roe* controls this issue, and, thus, Petitioners cannot bring suit as next friends of the proposed classes of unborn children.

Further support is provided by Texas law in the case of *Brady v. Doe*, 598 S.W.2d 338 (Tex. Civ. App. – Houston [14th Dist.] 1980, writ ref'd. n.r.e.), *cert. denied*, 449 U.S. 1081 (1981), a case analogous to the case in point. There, the court affirmed the trial court's dismissal based on lack of standing, holding that inasmuch as an unborn child was not a "person" and, therefore, not a "minor", a plaintiff seeking to bring suit as next friend of an unborn child of a pregnant woman to enjoin the pregnant woman from having an abortion lacks standing to sue. A "next friend" may not be appointed to represent an unborn fetus under Rule 44. *Brady v. Doe*, 598 S.W.2d at 339.

The proposed class of recently born children (children born alive after abortion) is likewise not entitled to representation by Petitioners as next friends. Rule 44 provides in pertinent part that "minors...*who have no legal guardian* may sue and be represented by 'next friend'." TEX. R. CIV. P. 44 (emphasis added). Assuming, *arguendo*, that the so called "recently born" actually exist, any members of this proposed class would already have legal guardians—their parents or the Texas Department of Human Services.[2] *See* Tex. Fam. Code Ann. § 17.011 (Vernon Pamph 1986); *see also Keith v. Daley*, 764 F.2d 1265, 1271 (7th Cir. 1985) ("[A]n abortion is not an automatic termination of parental rights on the part of the mother for any fetus 'born alive' as a consequence of the abortion.").

Additionally, the proposed class of recently born children

2. Section 17.011 of the Texas Family Code designates the Texas Department of Human Services as the lawful guardian of any child born alive as the result of an unsuccessful abortion.

would not be entitled to the appointment of Petitioners as guardians ad litem in this case. Under Rule 173 of the Texas Rules of Civil Procedure, a guardian ad litem may be appointed to represent a party who is represented in a suit by a next friend or guardian with an interest adverse to the party. TEX. R. CIV. P. 173 (Vernon 1976). Petitioners have not established any such "adverse interest" with respect to any abortion survivor; therefore, they have no standing to bring suit as guardians ad litem.

B. Petitioners Lack Personal and Representative Capacity as Citizen, Resident and Taxpayer Claimants.

Petitioners Berkley and Gomez claim to bring suit as citizen, resident and taxpayer claimants, both individually and as class representatives of like individuals. The Texas Court of Appeals correctly ruled that as a matter of Texas law, Petitioners Berkley and Gomez do not have standing to bring or maintain suit.

At the outset, it should be noted that the issue of citizen, resident and taxpayer standing is completely governed by state law and thus presents no federal question. Therefore, Petitioners have failed to invoke the jurisdiction of this Court for the purpose of this appeal.

Notwithstanding the problems of jurisdiction, the common law rule of standing in Texas requires that a claimant show a personal and particularized injury or damage to present a justiciable controversy before the court. *City of San Antonio v. Stumberg, 70 Tex. 366, 7. S.W. 754 (1888); Scott v. Board of Adjustment,* 405 S.W.2d 55, 56 (Tex. 1966); *cf.* federal law: *Ass'n of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970); *Warth v. Seldin,* 422 U.S. 490 (1975). Petitioners, however, have not met the basic requirements of standing under the common law rule. They have shown no personal stake in the case apart from a strong moral and passionate interest in the subject matter, which very well may be shared by many other members of the public. In the absence of a personal and particularized injury, however, this is no basis for asserting a private claim under the law. *See Tri County Citizens Rights Organization v. Johnson,* 498 S.W.2d 227 (Tex. Civ.

App.—Austin 1973, writ ref'd n.r.e.)

Petitioners correctly observe that standing without a showing of personal and particularized injury or interest is sometimes available based upon "taxpayer" status to challenge the *lawfulness* of the expenditure of public funds. Such standing in a suit to enjoin such expenditure, however, would require a showing that there is an agreement in violation of the Texas Constitution or which is otherwise illegal. *Kordus v. The City of Garland*, 561 S.W.2d 260, 262 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.). Petitioners, however, cannot show the existence of any agreement which violates the law.

As is discussed in Section II below, this Court has maintained that as far as the United States Constitution is concerned, the expenditure of public funds on abortions is a legislative, not a judicial decision. *See Harris v. McRae*, 448 U.S. 297, 320 (1980); *see also Maher v. Roe*, 432 U.S. 464, 481 (1977). Furthermore, Petitioners are unable to establish that the expenditure of public funds on abortion somehow conflicts with the Texas Constitution. Failing this, and also failing to demonstrate an otherwise illegal agreement, the Texas Court of Appeals correctly held that Petitioners failed to meet the test of taxpayer standing as set out in *Kordus*.

Since Petitioners lack standing individually as citizen, resident and taxpayer claimants, their claim on behalf of the proposed Texas-wide class also fails. *see* TEX. R. CIV. P. 42 (a) (3); *see also Kordus*, 561 S.W.2d at 262.

II. THE USE OF STATE RESOURCES ON ABORTIONS OR FOR ABORTION-RELATED ACTIVITY IS LAWFUL.

Petitioners Berkley and Gomez (the taxpayer claimants) argue that the expenditure of public funds on abortions or abortion-related activity violates the United States Constitution and is therefore unlawful. They allege that because the University of Texas, a state institution, owns and operates a medical school affiliated with Hermann Hospital, the expenditure of public funds for teaching and performing abortions within those institutions is unlawful. However, even if these

allegations were true, Petitioners have failed to show a legal wrong.

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court held that a state could not make or enforce a law that would deny a woman her constitutional right to terminate her pregnancy without regard to the stage of pregnancy. 410 U.S. at 154. It was held that for the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. *Roe*, 410 U.S. at 165. This Court further held that *after* the first trimester of pregnancy, "the State...*may, if it chooses,*" regulate abortions in the second and third trimesters of pregnancy. *Roe*, 410 U.S. at 165-66 (emphasis added). However, no where in *Roe* did this Court ever *require* state regulation as to any aspect of abortion. So in effect, this Court held inferentially that a State may, if it so chooses, "aid" abortions.

The issue of public funding of abortions is by no means novel to this Court. This Court has uniformly maintained that the decision to expend public funds for abortions is a matter of legislative prerogative. In past cases, it has usually been the reverse situation before the courts i.e., the legislative decision to *refrain* from funding abortion activity. *See Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 467 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977). In those cases, this Court has consistently held that neither a state nor city violates the United States Constitution by expressing a preference for childbirth over abortion in the allocation of public funds, *so long as the regulation does not restrict access to abortion itself. Harris v. McRae*, 448 U.S. at 315; *see also Maher v. Roe*, 432 U.S. at 473-74. Just as the decision not to spend public funds is a legislative choice, the decision to expend public funds for abortions and for related research is a matter of legislative choice. Moreover, this Court has previously pointed out in other contexts the impropriety of "compelling" the states to enact a legislative program. This would run counter to the essence of the tenth amendment. *See e.g., Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 766 (1982); U.S. CONST. amend X.

Consequently, Petitioners' allegations of state action, even if true, are of no consequence since the funding of abortions is completely lawful. Petitioners' remedy lies in the state legislature and not in the courts.

III. *ROE V. WADE* AND *DOE V. BOLTON* ARE SOUND PRECEDENT.

Petitioners argue that *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973) should be reconsidered and overruled based on the following reasons:

A. New evidence as to when life begins,

B. Unintended consequences produced from *Roe* and *Doe*,

C. Factual inaccuracies in the Court's analysis.

D. Constitutional errors in the Court's analysis, and

E. Lack of personal jurisdiction over abortion "victims".

Petitioners' Brief at 11-24.

As to the first reason, the existence of new, scientific evidence concerning when human life begins is irrelevant to the validity of *Roe* and its progeny. Petitioners miss the entire import of *Roe v. Wade*. This Court held that in the early stages of pregnancy, the constitutional right of privacy is broad enough to encompass a woman's decision of whether to terminate her pregnancy. 410 U.S. at 154-55. That is, a woman may indeed *terminate* her pregnancy. Hence, the woman's decision has nothing to do with the question of when life begins. This is illustrated by the following language:

> We need not resolve the difficult question of when life begins when those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at a consensus, the judiciary, at this point, in the development of man's knowledge, is not in a position to speculate as to the answer.

Roe, 410 U.S. at 160. The Court's reasoning in the above quote still holds true today.

Petitioners also argue that *Roe* produced several unintended consequences, such as "abortion on demand." However, this consequence is not completely unintended since *Roe* clearly endorsed the right to an abortion within the first trimester of pregnancy, subject to that of only the physician's medical judgment. *See* 410 U.S. at 165. The Court only rejected the notion that a woman's right to an abortion is absolute at whatever time and in whatever manner she chooses. 410 U.S. at 155. The state may, *if it chooses*, this Court held, regulate abortions after the first trimester of pregnancy [410 U.S. 165]; however, regulation is not required.

Petitioners further claim to have evidence that an "abortion survivor" (fetus that survived the abortion) was murdered at a hospital not even named a defendant in the instant suit. *See* Petitioners' Brief at 13. Apart from basic problems of relevancy, the implication that *Roe* or even Texas law sanctions such actions is erroneous. In *Roe*, this Court noted that responsibility for abortions must ultimately rest with the physician and further noted that: "If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available." 410 U.S. at 167.

Furthermore, in Texas viable fetuses "born alive" after abortions are accorded the same rights, powers and privileges as those children born after the normal period of gestation. *See*, TEX. FAM. CODE §12.05 (Vernon Pamph 1986). Thus, under Texas law, physicians owe a duty of care to such infant survivors. *Id.* Additionally, physicians are subject to criminal liability for the murder of viable fetuses "born alive" after abortions in Texas. *See Showery v. State*, 690 S.W.2d 689 (Tex. App.—El Paso 1985). Hence, the tacit accusation that the State of Texas provides no legal recourse for outright unlawful acts is completely unfounded.

Petitioners next point to factual inaccuracies in the Court's survey of the history of abortions in *Roe*. *See Roe*, 410 U.S. at 129-48. However, the Court's discussion of ancient attitudes

regarding abortion was at most contextual in significance and was certainly not the basis for the Court's holding.

Finally, Petitioners argue that *Roe* is constitutionally flawed and is invalid because the Court lacked personal jurisdiction over abortion "victims". These arguments make sense only if the Court were to depart from its key holding that the word "person", as used in the fourteenth amendment, does not include the unborn. *See Roe*, 410 U.S. at 158. Respondents herein are of the opinion that the Court's reasoning on this point is both cogent and sound and should not be departed from.

The integrity of our judicial system depends upon the doctrine of *stare decisis*, which requires that once the law is settled by the highest Court that precedent should not be departed from. While arguments that the Supreme Court erred in interpreting the Constitution in *Roe* and *Doe* continue to be made, this Court has consistently reaffirmed its position at every opportunity. *See City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). Therefore, *Roe* and *Doe* are irrefutably, constitutionally valid decisions.

In light of the foregoing, this Court's decisions in *Roe* and *Doe* are sound and do not warrant reconsideration.

IV. THE TEXAS COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW IN UPHOLDING THE AWARD OF ATTORNEYS' FEES.

A trial court's ruling on a motion for an award of attorneys' fees under 42 U.S.C. § 1988 may be reviewed on appeal for "abuse of discretion." *Torres v. County of Oakland*, 758 F.2d 147 152 (6th Cir. 1985); *Equal Employment Opportunity Commission v. St. Louis San Francisco Railway Company*, 743 F.2d 739, 744 (10th Cir. 1984). This is the law of the Fifth Circuit, where Texas is located. In *Welch v. University of Texas and its Marine Science Institute*, 659 F.2d 531 (5th Cir. 1981), the Fifth Circuit held: "The district court has broad discretion in awarding attorney fees; the amount will be altered only in the event of a clear showing of abuse of discretion," 659 F.2d 535; *accord Harris v. Plastics Manufacturing Company.*, 617 F.2d 438, 440 (5th Cir. 1980).

In the instant case, the Texas Court of Appeals upheld the trial court's award of attorneys' fees to Respondents Ali et al on the grounds that Petitioners did not show that the trial court "abused its discretion" in awarding such fees. In light of the preceding cases, the Texas Court of Appeals clearly applied the correct standard of review and thus committed no error. Petitioners erroneously insist that an appellate court must independently determine whether the plaintiff's claim was "frivolous, unreasonable and without foundation." However, that standard of proof is to be applied by the trial court in the first instance. *See Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412 (1978). In this case, it must be presumed that the trial court applied the correct standard of proof because the correct standard was set forth in Respondents Ali, et al's Motion for Attorneys' Fees. (*See* Appendix "A").

In light of the above, Petitioners have failed to show that the appellate court mishandled the attorneys' fees issue. They have confused the standard of proof to be applied at trial with the standard of review to be applied upon appeal. Since the trial court and the appellate court applied their respective standards correctly, there is no error with respect to the award of attorneys' fees in this case.

CONCLUSION

For the foregoing reasons, as well as the reasons contained in the opinion rendered by the Texas Court of Appeals, Petitioners lack standing to bring and maintain suit against Respondents. Therefore, Respondents request that Petitioners' application in all things be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Executive Assistant

J. PATRICK WISEMAN
Chief, State & County Affairs

JAMES C. TODD
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120

Attorneys of Record for Respondents

PROOF OF SERVICE

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

I, James C. Todd, depose and say that I am attorney of record for Respondents herein, and that on May _____, 1986, pursuant to Rule 28, Rules of the Supreme Court, I served three (3) copies of the foregoing Joint Brief in Opposition to the instant Petition for Writ of Certiorari on opposing counsel by U.S. mail in a duly addressed envelope, with first class postage prepaid, certified, return receipt requested to Richard W. Schmude, counsel of record for Petitioners, at P.O. Box 674, Tomball, Texas 77375.

JAMES C. TODD

Subscribed and sworn to before me on the _____ of May, 1986.

Notary Public in and for the
State of Texas

My Commission expires:_____

APPENDIX A

NO. 79-346-30

REBECCA P. SCHWANECKE, ET AL *Plaintiff*	§	IN THE DISTRICT OF
VS.	§	HARRIS COUNTY, TEXAS
VASEEM ALI, M.D., ET AL *Defendants*	§	127th JUDICIAL DISTRICT

MOTION FOR ATTORNEYS' FEES

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Defendants Vaseem Ali, Mark White and his successors, and The University of Texas, and file this their Motion for Attorneys' Fees. In support thereof, Defendants would show the Court as follows.

I.

Under 42 U.S.C. 1988, the prevailing party in civil rights litigation is entitled to an award of attorneys' fees.

II.

Based on the well-established case law, both the state and the federal, and the previous grant by this Court of *Three Summary Judgment Motions* against the Plaintiff, Plaintiff's decision to continue litigating this matter against the remaining Defendants is frivolous, unreasonable, and groundless.

IV.

Mitchell Green, Attorney for the Defendants, has been forced to expand eight hours of legal time reviewing the file on this case and preparing the instruments necessary to terminate this litigation. A reasonable rate for such time is $80 an hour. Furthermore, Mr. Green and the Defendants have been forced to incur out-of-pocket expenses of $90 for roundtrip air fare to appear before the Court on June 25,

1984. This appearance is reasonably anticipated to last one hour. A reasonable rate for this Court appearance is $100 per hour.

V.

A reasonable amount of attorneys' fees in this case is $830.

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully pray that pursuant to 42 U.S.C. 1988, this Court award attorneys' fees in the amount of $830.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

LOU McCREARY
Chief, State & County Affairs

/s/

MITCHELL J. GREEN
Assistant Attorney General
BAR NO. 08365700
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested on this the 17th day of May, 1984, to:

Mr. Richard Schmude
P.O. Box 674
Tomball, Texas 77002

/s/

MITCHELL J. GREEN

STATE OF TEXAS §

COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared MITCHELL J. GREEN who after being duly sworn, on his oath did depose and say that he is an Assistant Attorney General of the State of Texas, that he is the Attorney for Defendants and has full authority to make this Affidavit on behalf of Defendants and that the facts and allegations contained in the foregoing pleading are true and correct.

/s/

MITCHELL J. GREEN

SUBSCRIBED AND SWORN TO BEFORE ME on this the 17th day of May, 1984.

/s/

Notary Public in and for
the State of Texas

Kevin O'Hanlon

My Commission Expires: 10-19-85